

BRB No. 05-0333

PETER J. DESJARDINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED: 11/30/2005
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-1364) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In 1982, claimant began working for employer as a pipefitter. His duties included repetitive pushing and pulling on pipe wrenches and turning valves, as well as fabrication and hand welding. In 1999, claimant was diagnosed with bilateral carpal tunnel syndrome. Claimant had surgery on his right hand on December 1, 1999, from which he recovered without residual impairment. Following surgery on his left hand on January 12, 2000, claimant developed tingling and numbness. He had additional surgery on this hand on October 11, 2000. Claimant continued to complain of problems in this hand, and he sought permanent partial disability benefits for a 20 percent left upper extremity

impairment based on the opinion of his treating physician, Dr. Kalvoda. Employer voluntarily paid claimant for a four percent impairment, based on the opinion of its expert, Dr. Brigham.

In his decision, the administrative law judge credited the opinion of Dr. Brigham over that of Dr. Kalvoda and denied claimant benefits in excess of the four percent permanent partial disability benefits already paid by employer. On appeal, claimant challenges the administrative law judge's finding that Dr. Brigham's opinion is entitled to greater weight than that of Dr. Kalvoda. Employer responds, urging affirmance of the administrative law judge's decision.

In the event of an injury to a scheduled member, recovery for permanent partial disability is confined to that provided in the schedule at Section 8(c)(1)-(19) of the Act, 33 U.S.C. §908(c)(1)-(19), and is based on the degree of physical impairment. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). The Act does not require that scheduled awards be based on the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) except in cases involving hearing loss and voluntary retirees. See 33 U.S.C. §§902(10), 908(c)(13), (23). Rather, the administrative law judge is not bound by any particular formula but may rely on a variety of medical opinions and observations in addition to claimant's description of symptoms and the physical effects of his injury in assessing the extent of permanent impairment. See *Pimpinella v. Universal Maritime Services*, 27 BRBS 154, 159-160 (1993). The administrative law judge may, however, rely on a medical opinion based on the AMA *Guides*, as it is a standard medical reference. See, e.g., *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583, 585 (1979). Claimant contends that the administrative law judge unreasonably relied on the impairment rating of Dr. Brigham, a reviewing doctor who never examined claimant, over the opinion of his treating physician, Dr. Kalvoda, who performed claimant's surgeries. Claimant also avers that while Dr. Brigham criticized Dr. Kalvoda's application of the AMA *Guides*, his opinion is similarly faulty because Dr. Brigham did not personally examine claimant as the *Guides* require. Claimant argues that because it is well established that use of the AMA *Guides* is not required, the administrative law judge erred in giving undue weight to the procedures required by the *Guides* and to Dr. Brigham's expertise concerning its application.

The administrative law judge properly noted that use of the AMA *Guides* to rate claimant's impairment is not mandated by the Act, but stated that both physicians purported to rely on the *Guides*. Decision and Order at 4. In support of his claim, claimant submitted Dr. Kalvoda's opinion that claimant has a 20 percent left upper extremity impairment based on the AMA *Guides*. The administrative law judge is entitled to evaluate the doctor's opinion to determine whether it is well-reasoned and documented, including whether Dr. Kalvoda correctly applied the AMA *Guides*. See

generally *Cotton v. Army & Air Force Exchange Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154,159 (1993). Dr. Kalvoda's opinion states in relevant part:

When using the Guides to Evaluation of Permanent Impairment put out by the American Medical Association, one finds that Mr. Desjardins has a moderate degree of impairment involving the left hand, which results in a 20% upper extremity impairment on the left, which can be changed to a whole person impairment of 12%. It principally involved the hypersensitivity radiating to the digital nerves from the ulnar aspect of the middle finger and the radial aspect of the ring finger.

CX 8 at 26. The administrative law judge found that Dr. Kalvoda offered no explanation beyond this assessment. Decision and Order at 3. The administrative law judge then relied on Dr. Brigham's opinion concerning the deficiencies in Dr. Kalvoda's opinion,¹ and concluded that in light thereof he need not credit Dr. Kalvoda's opinion merely because he is the treating physician. *Id.* The administrative law judge's rejection of Dr. Kalvoda's opinion on this basis is rational and is affirmed. See generally *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1978) (1st Cir. 1978).

The administrative law judge next examined the opinion of Dr. Brigham, who opined that claimant has a four percent impairment under the Fifth Edition of the AMA *Guides*. The administrative law judge found that Dr. Brigham's opinion is based on the specifics of this case,² and on his knowledge of the application of the AMA *Guides*,³ and

¹ Essentially, Dr. Brigham's criticism is that Dr. Kalvoda did not reference which edition of the *Guides* he used, or explain which tables and criteria he utilized in arriving at the 20 percent rating, and that he did not properly employ the *Guides* to determine the degree of disability, taking severity into account. EX 19 at 3-5.

² Dr. Brigham stated that he obtained claimant's clinical data from the records of Dr. Kalvoda. Dr. Brigham also referenced Dr. Vigna's various objective findings, when he performed nerve conduction studies in 1997, 1999 and 2000. EX 19.

³ The administrative law judge stated that Dr. Brigham is the Editor-in-Chief of *The Guides Newsletter*, the AMA publication on the use of the *Guides*. EX 19. He is the Editor of *The Guides Casebook*, the AMA textbook for the Fourth and Fifth Editions of the AMA *Guides*. *Id.* Dr. Brigham is board-certified in occupational medicine, a fellow of the American Academy of Disability Evaluating Physicians, and the Director of the Division of Occupational Health. *Id.*; Decision and Order at 3.

warranted determinative weight based on Dr. Brigham's credentials, experience, and the well-reasoned nature of the opinion. The administrative law judge rejected claimant's contention that Dr. Brigham's opinion is deficient because he did not examine claimant, as the administrative law judge credited Dr. Brigham's opinion that the *AMA Guides* do not require a personal examination by the reviewing physician when adequate clinical documentation is available. Decision and Order at 4.

It is well settled that the fact-finder is entitled to weigh the medical evidence and to draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Claimant has not demonstrated any error in the administrative law judge's decision to credit Dr. Brigham's opinion. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.1962), *cert. denied*, 372 U.S. 954 (1963). Specifically, the administrative law judge rationally credited Dr. Brigham's statement that it was not necessary that he personally examine claimant due to the adequacy of the information provided in Dr. Kalvoda's records. To the extent that claimant seeks a re-weighing of this evidence, it is beyond our scope of review.⁴ *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Therefore, as the credited opinion of Dr. Brigham's constitutes substantial evidence supporting the administrative law judge's finding, we affirm the administrative law judge's determination that claimant suffers from a four percent permanent impairment to his upper left extremity.

⁴ Dr. Brigham's report quoted language from the 4th edition of the *Guides* stating that "if the clinical findings are fully described, any knowledgeable observer may check the findings with the *Guides* criteria," in explaining that it was not necessary that he examine claimant in order to make an assessment. EX 19 at 4.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge